Supreme Court, U.S.
FILED
APR 22
OFFICE OF THE CLERK

No. 02-1097

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

REPLY BRIEF FOR PETITIONER

JOHN M. THOMAS
MICHAEL J. O'REILLY
FORD MOTOR COMPANY
Parklane Towers West
Three Parklane Boulevard
Suite 300
Dearborn, MI 48126-2568
(313) 337-2515

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS G. HUNGAR
MIGUEL A. ESTRADA
THOMAS H. DUPREE, JR.
WILLIAM E. THOMSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner
(Additional counsel listed on inside cover)

15 pp

WALTER DELLINGER
BRIAN D. BOYLE
JONATHAN D. HACKER
MATTHEW M. SHORS
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Additional Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. Plenary Review Is Warranted 1

A. The Concerns Expressed In *State Farm* Are Magnified, But Ignored, In Products Cases 2

B. Respondents' Factual Distortions Illustrate The Special Problems Of Products Cases 5

II. At A Minimum, A GVR Is Warranted 8

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

CASES

Anchor Hocking, Inc. v. Waddill, No. 02-370 8

BMW v. Gore, 517 U.S. 559 (1996) ..... *passim*

Clark v. Chrysler Corp., 310 F.3d 461 (6th Cir. 2002) 1, 3

Ford Motor Co. v. Smith, No. 02-1096 ..... 1, 3

Key Pharmaceuticals, Inc. v. Edwards, No. 02-342 8

People v. Rowland, 4 Cal. 4th 238 (1992) 10

State Farm Mutual Automobile Insurance Co. v. Campbell, No. 01-1289 (April 7, 2003) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. XIV, § 1 1

STATUTES

49 U.S.C. § 30165(a) 9

CAL. CIV. CODE § 3294(b) 3

OTHER AUTHORITIES

Rule by numbers—An end to America's enormous punitive-damages awards?, The Economist, Apr. 12, 2003, at 66 2

REPLY BRIEF FOR PETITIONER

This Court's ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (April 7, 2003), demonstrates that the $290 million punitive damage award in this case violates the Due Process Clause; at a minimum, this Court should grant certiorari, vacate the judgment and remand for further consideration ("GVR") in light of *State Farm*. But as Ford demonstrated in its Petition, and as illustrated by Respondents' opposition and the six briefs joined by 39 *amici curiae* representing virtually every sector of the American business community, there are special and powerful reasons for this Court to go farther and grant plenary review. Ford recognizes that this request for plenary review in the wake of *State Farm* is unusual, but this case—along with *Ford Motor Co. v. Smith*, No. 02-1096 (pet. for cert. pending), and *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002) (pet. for cert. forthcoming)—presents an unusually good opportunity to address critical and recurring issues unique to product liability and other cases involving activities that are beneficial to society but that necessarily create risks of serious personal injury and death.

I. Plenary Review Is Warranted

Respondents' opposition demonstrates why the Court should grant plenary review. To avoid any meaningful analysis under *BMW v. Gore*, 517 U.S. 559 (1996), Respondents, like the court below, like the courts in *Smith* and *Clark*, and like numerous other courts, argue that, "unlike any other case decided by this Court," Ford's design of the 1978 Bronco "risked lives and caused deaths." Opp. 8. They even contend that *State Farm* has no bearing here because Ford's design decisions "amount[ed] to manslaughter" and resulted in "death—not 'minor' economic harm," Opp. 29, a theme that was reflected in public comments as soon as *State*

Farm was decided.[1] Neither *Gore* nor *State Farm* supports this argument, but the lower courts have erroneously adopted it time and time again, and it is clear Respondents and other plaintiffs intend to keep advancing it despite *State Farm*. There is no need to allow these issues to percolate; that process has been occurring for the seven years since *Gore*, and has produced numerous huge punishments that make a mockery of due process. Plenary review is warranted.

A. The Concerns Expressed In *State Farm* Are Magnified, But Ignored, In Products Cases

As confirmed by the *amici*, the concerns expressed in *State Farm* about arbitrary and excessive punitive damages (slip op. 6-7) are particularly acute in product liability and other personal injury cases.

The Court recognized "the imprecise manner in which punitive damages systems are administered," slip op. 7, including the danger of inadequate jury instructions: "Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* (citation omitted). Here, the court rejected Ford's proposed punitive damage instructions (Pet. App. 49a-53a), and, by substituting a generic instruction over Ford's objection that it violated due process and was unconstitutionally vague, RT 9657, left the jury with little or no guidance. Moreover, product liability cases almost always involve "inflammatory" evidence regarding the defendant's wealth and other "evidence that has little bearing as to the amount of punitive damages," slip op. 7, yet instructions usually omit the factors that *do* bear on the size of the punishment. *See, e.g.*, Brief of

---

[1] *See, e.g., Rule by numbers—An end to America's enormous punitive-damages awards?*, The Economist, Apr. 12, 2003, at 66 ("Robert Peck of the Association of Trial Lawyers of America says that the single-digit guideline does not apply when plaintiffs have been bereaved or injured. If the courts agree with him . . . product-liability suits would all be unaffected. The gold mine may not be exhausted yet.").

Amici Alliance of Automobile Manufacturers *et al.* at 4 ("The automotive industry has been subjected to random imposition of punitive damages, in huge amounts, with respect to designs that meet industry standards, that exceed federal safety standards, that NHTSA itself has investigated and not found defective, and that have been found safe by other juries.").

Thus, while Respondents repeatedly claim that Ford's conduct was grossly reprehensible because "the jury found malice," Opp. 14, the jury's largely uninformed finding says nothing about the *degree* of reprehensibility that is central to the *Gore* analysis. *See* 517 U.S. at 588 (Breyer, J., concurring) (state statute authorizing punitive damages in cases of "malice" does not "contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards"). California defines "malice" to include "conscious disregard for the . . . safety of others," CAL. CIV. CODE § 3294(b)—in other words, "broadly, to encompass far more than the egregious conduct that [the] term[ ], at first reading, might seem to imply." *Gore*, 517 U.S. at 588 (Breyer, J., concurring).

Particularly as applied to product liability design defect cases, the term "malice" is fraught with vagueness. Here, for example, the court of appeal reasoned that Ford acted with malice because it allegedly disregarded safety when it marketed a vehicle it "knew" could cause injury, and then leveraged that conclusion directly into a finding of serious reprehensibility. Pet. App. 35a-39a. *See also Smith* Pet. App. 17a; *Clark*, 310 F.3d at 482 (Chrysler's design more reprehensible than the "repaint[ing]" in *Gore* because it "resulted in the loss of life"). But this approach nullifies the *Gore* reprehensibility guidepost because *all* design decisions require a balancing of safety versus utility, and consequently there is a danger that *any* design decision could be deemed by a jury in hindsight to have been "malicious," especially when the jury is confronted with a tragic accident that has resulted in seri-

ous injuries or death. Pet. 14-15.[2] This risk of arbitrary and excessive punishment makes it particularly important that the "principles set forth in *Gore* . . . be implemented with care," slip op. 17, but courts have cast them aside in product liability cases involving personal injury or death. *See* Pet. 9-11; Brief of *Amici* Product Liability Advisory Council ("PLAC"), *et al.* at 10 ("we are unaware of a single published post-*BMW* opinion concluding that a manufacturer's conduct was not sufficiently egregious to warrant the penalty imposed"). Respondents do not deny this phenomenon—indeed, they vigorously *defend* it. Opp. 11-13.

The court of appeal focused so heavily on the tragic nature of the injuries that it justified the $290 million penalty by equating Ford's design of the Bronco roof 25 years ago to "involuntary manslaughter," Pet. App. 35a, a label Respondents repeatedly hammer (*e.g.*, Opp. 1, 8, 12). Ford, of course, was "not . . . accorded the protections applicable in a criminal proceeding." *State Farm*, slip op. 6-7, 18.

These problems plague companies of all types. *See, e.g.*, Brief of *Amici* Twenty Leading Non-Automotive Companies at 6-7 ("If merely manufacturing a product or engaging in an activity with a potential for causing serious injury is, in and of itself, highly reprehensible, then the *BMW* reprehensibility guidepost will never constrain excessive punitive damage awards in cases against companies like *amici*."). Moreover, excessive punitive damages impose severe punishment "for decisions that, in other contexts, would be viewed as entirely appropriate and often beneficial." Brief of *Amicus* Mercedes-Benz USA at 6 (discussing how punitive damage awards deter innovative safety improvements).

---

[2] The court here even recognized that there was no evidence that any individual Ford employee acted with malice, but nonetheless stretched the malice standard to hold that "in the case of a large corporation" it could "piec[e] together knowledge and acts of the corporation's multitude of managing agents" spread over decades. Pet. App. 23a-25a, 32a.

B. Respondents' Factual Distortions Illustrate The Special Problems Of Products Cases

Respondents' distortion of the record renders the facts of this case unrecognizable, but their tactic illustrates why this Court should grant plenary review. Respondents use the jury's 9-3 vote finding "malice," coupled with the emotion and sympathy generated by the death of three people, as a predicate for unsupported assertions that were not the subject of jury findings. For the most part, Respondents do not cite the record (Opp. 4-5), and simply ignore all undisputed facts favoring Ford. A few examples show how Respondents, and plaintiffs in product liability cases generally, exploit "hindsight bias" and litigation complexities to nullify the *Gore* due process guideposts. PLAC Br. at 4-5 ("Looking through the virtually inescapable lens of hindsight bias at a seriously injured plaintiff on the one hand and a large corporate defendant that balanced safety against other benefits such as product usefulness, attractiveness, and cost to consumers on the other, juries are easily provoked to a state of outrage that leads them to award astounding sums in punitive damages.").

1. Respondents declare that "Ford knew" that "strong roofs . . . protect passengers in rollover accidents," Opp. 4, but fail to mention the undisputed evidence that this theory has been vigorously debated for decades within the automotive engineering community. In fact, Ford introduced the testimony of Dr. Edward Moffatt, recognized as one of the preeminent experts in the field of rollover biomechanics and automotive safety design. Dr. Moffatt testified, based on extensive testing and more than 20 years of study, that roof strength does not make a significant difference in preventing serious injuries in rollover accidents. *See* RT 8433 ("[I]t does not matter statistically, and test-wise it was proven again and again that when people wear production belts in production cars your head will be against the roof. And if your head is against the roof and you suffer an impact, at that point it doesn't matter if the roof is stronger."); *see also* RT 8675 (adding strength beyond federal requirement made "no differences" in safety).

In other words, the uncontroverted evidence shows not that "Ford knew" that Respondents' experts were correct, but rather that for the past 30 years there has been a serious, reasonable debate regarding the extent to which roof strength reduces injuries in rollover accidents.[3] Ford built the Bronco roof to exceed by 100% the only federal roof strength standard that then existed—which applied only to passenger cars but not SUVs—and to exceed by 30% the standard that NHTSA enacted more than a decade later specifically to govern SUVs.[4] Respondents' criticisms of these roof strength standards show, at most, a reasonable disagreement on safety policy issues, not gross reprehensibility. *See Gore*, 517 U.S. at 570-71, 577-78 (even assuming that it would be "wise for every State to adopt Dr. Gore's preferred [disclosure] rule," BMW's reasonable reliance on state statutes adopting different rule did not justify $2 million award).

2. Respondents falsely claim that "Ford knew that in . . . rollovers weak roofs would 'penalize' (kill) seat-belted passengers (who remain upright)." Opp. 4. This is a reference to a single 1968 memorandum unrelated to the 1978 Bronco in which the author expressly recognized that the limited data he was reviewing were inconclusive, Ex. 302.241, at

---

[3] "When government agencies or an entire industry have reached the same conclusion as the defendant, it is apparent that reasonable people could reach that conclusion, and the degree of reprehensibility under *BMW*—if reprehensibility exists at all—is necessarily very low." Brief of *Amici* National Ass'n of Independent Insurers, *et al.*, at 11. It is worth noting that, when Respondents claim that "[a]utomotive experts" made critical comments about the Bronco, Opp. 1, they are talking about their own paid experts in this case.

[4] Ford's engineers testified that they believed that the 1978 Bronco was safe and that the roof, which was designed to be removed like that on a convertible, provided "adequate protection" given the nature of the vehicle. RT 6059-60, 6572, 6578, 6589. And three Ford engineers who designed the 1978 Bronco, including the chief engineer, testified that they used the Bronco as a personal vehicle to transport their families. (Bambanek Dep. at 7-12; Bibb Dep. at 9, 73-74, Kohrs Dep. at 519) (attached to Carcione Decl., 7/28/00).

BB002567 ("materially small" and "marginal" significance of data provides "indication, not a proof"). Other memoranda show that Ford policymakers ultimately rejected the tentative conclusion contained in that 1968 memorandum. *See, e.g.*, Ex. 230.39.8 (1971 Ford paper: "[B]ased upon the data reviewed we have seen no evidence to conclude or correlate roof strength with occupant safety/injury."). This was an era of sharp debate (but sparse data) in the engineering community regarding roof strength and seat belts, so it is hardly surprising, and surely not "reprehensible," that engineers within Ford were debating these issues too.

3. Respondents claim that Ford violated an "internal engineering 'consensus' that SUVs need roll bars . . . by 'deleting' the steel 'integral roll bar' in the Bronco's 'B' pillar," Opp. 5, but while some Ford engineers in the late 1960s may have felt that roll bars "probably" should be required, RT 3209, other engineers at Ford and throughout the industry disagreed. Thus, Ford's internal design standards indisputably did not require a roll bar on SUVs, nor did the internal standards of any other manufacturer. RT 3430-31; RT 6078-79. Moreover, Respondents fail to mention the undisputed fact that Ford also made changes during the design process to the 1978 Bronco's B-pillar—where the originally-planned roll bar would have been—so that, as redesigned, the B-pillar was strong enough to provide the same protection as the standard roll bar would have provided. RT 6077.[5]

4. The 1978 Bronco's roof design indisputably was comparable to the designs of numerous other SUVs of that era. RT 2517-19, 6814-16, 2591-92. None of these vehicles had a standard roll bar, and there is no evidence that their fiberglass roofs were reinforced with steel. Respondents point

---

[5] Respondents also argue that Ford violated an internal ban on using fiberglass for an SUV roof, Opp. 5, 13, but a Ford engineer with personal knowledge testified that it was *ten years after* the 1978 Bronco's design that Ford first established a policy against using fiberglass. RT 6059-61. Respondents' expert, who was not involved in the Bronco's development, had no personal knowledge to the contrary. RT 3295-96, 3427-32.

to no evidence, and there is none, that anyone at Ford perceived a "'roof crush problem,'" Opp. 2, with the 1978 Bronco when, in 1980, Ford made a safety improvement by strengthening the Bronco roof. Rather, the only evidence is that Ford sought to match a design change that had been made in the Chevy Blazer—hardly the sort of egregious misconduct that warrants a $290 million sanction.[6]

II. At A Minimum, A GVR Is Warranted

This Court should, in the alternative, GVR in light of *State Farm*, as it did yesterday in five other cases, including two product liability cases (*Anchor Hocking v. Waddill*, No. 02-370; *Key Pharms. v. Edwards*, No. 02-342). Among other things, the Court in *State Farm* held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and noted that legislatures have historically authorized sanctions providing for double, triple, or quadruple damages. Slip op. 14-15. The Court further held that a $1 million compensatory award "was substantial," and that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 15. *See* Pet. 16 (arguing that 1:1 ratio may be excessive in products cases). The compensatory damages assessed against Ford are

---

[6] Respondents' argument that Ford's own statistical evidence at trial showed "the extreme danger" of the 1978-79 Bronco, Opp. 1-2, when compared to the 1980 Bronco and other SUVs, is a manipulated illusion. Ford's evidence actually showed that, with respect to the rate of serious injuries and deaths experienced in SUV rollovers, the 1978-79 Bronco was about average. *See* Exhs. 204.5, 208.19; *see also* RT 5121 (respondents' expert testimony) ("You are 99.99 percent as likely to survive [any given] year in a '78-79 Bronco as you are if you owned an '80-'96" Bronco). Respondents' other contentions—*e.g.*, that Ford attempted to create the false appearance of a roll bar, that Ford "rush[ed]" the 1978 Bronco to market, that Ford's testing was inadequate, and that Ford implemented a "corporate policy of 'misleading' the government" (Opp. 5)—are products of the same misleading manipulation of the record.

even more "substantial"—$4.6 million—and the 63:1 ratio is presumptively unconstitutional. Slip op. 15.[7]

State Farm makes clear that the court of appeal erred in deeming the third *BMW* guidepost—comparable penalties—"inapplicable" because Ford's alleged conduct could somehow be analogized to a crime. Pet. App. 39a; Pet. 17-19. This Court rejected an identical ruling in *State Farm*, slip op. 18, and held: "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." Here, the court of appeal *expressly relied* on the "remote possibility of a criminal sanction" to sweep aside the comparable penalty guidepost—and directly on-point penalties—to uphold the $290 million punishment.[8]

Like the Utah Supreme Court in *State Farm*, which reinstated the award based on the defendant's "enormous wealth," slip op. 16, the court of appeal here held that Ford's "enormous monetary resources" provided "adequate notice of the potential for punitive damages awarded in this case," Pet. App. 40a; Pet. 19-26. This Court in *State Farm* rejected this precise reasoning, holding that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," as it "bear[s] no relation to the award's reasonableness or proportionality to the harm." Slip op. 17.

---

[7] Respondents assert that the $4.6 million compensatory damages award was undercompensatory, Opp. 16-17, but "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages." *State Farm*, slip op. 8. In fact, Respondents were dramatically *over*compensated for their personal injuries. Juan Romo, for example, received a noneconomic damage award of over 40 times what he requested. CT 1481; RT 9554. Moreover, over 80 percent of Respondents' damages were emotional distress damages, CT 1481, which "contain [a] punitive element." *State Farm*, slip op. 16.

[8] Respondents do not even mention the comparable civil penalty established by federal law, which at the time of the conduct and trial, was $1,000 per vehicle, up to a maximum of $800,000 for a defective fleet of vehicles. *See* 49 U.S.C. § 30165(a).

The court here also relied on Ford's profits and sales *nationwide*, and thus embraced Respondents' argument that the jury should impose a punishment sufficient to make Ford, consumers, and the federal safety agency change their behavior in other States. Pet. 24-26.[9] But *State Farm* held that punitive damages may not be imposed to punish and deter out-of-state conduct, even unlawful conduct, that "bore no relation to [respondents'] harm." *State Farm*, slip op. 11-12. Ford also argued in its Petition (at 25) that the lower court's approach risked subjecting Ford to multiple and duplicative punishments if left uncorrected—a concern expressly recognized in *State Farm*. Slip op. 12.[10]

Finally, this Court performed an "[e]xacting appellate review" and its own independent examination of the facts in applying the *Gore* guideposts. *See* slip op. 8-18. This approach starkly contrasts with the lax standard of review employed by the court of appeal. Pet. 26-29.

CONCLUSION

The Court should grant plenary review or, in the alternative, GVR. Respectfully submitted.

---

[9] Respondents' contention that Ford waived this argument is incorrect. Ford moved *in limine* to exclude *all* evidence of its financial condition, including "all evidence of Ford's net worth related to economic activities taking place outside the State of California." CT 184; RT 343-47. Ford's counsel explained that the Constitution barred respondents' "attempt to ascertain what profits the defendant engaged in *for that activity* outside the jurisdiction and incorporate that into the punitive calculations." RT 345-46 (emphasis added). The trial court denied Ford's motion, thus preserving the issue, *see* Pet. 3 n.1. Ford reiterated these arguments post-trial in its new trial motion and reply, CT 30, 3418, and the court of appeal rejected Ford's argument under *Gore* that the plaintiff must "prove the defendant's profits from California only." Pet. App. 39a n.3.

[10] Moreover, although "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages," *State Farm*, slip op. 12, Ford was punished for dissimilar acts by the improper injection into jury deliberations of a *60 Minutes II* broadcast regarding alleged defects in Ford Mustangs. *See* Pet. 5.

JOHN M. THOMAS
MICHAEL J. O'REILLY
FORD MOTOR COMPANY
Parklane Towers West
Three Parklane Boulevard
Suite 300
Dearborn, MI 48126-2568
(313) 337-2515

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS G. HUNGAR
MIGUEL A. ESTRADA
THOMAS H. DUPREE, JR.
WILLIAM E. THOMSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

WALTER DELLINGER
BRIAN D. BOYLE
JONATHAN D. HACKER
MATTHEW M. SHORS
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Petitioner

April 22, 2003